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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C., **Federal Rules of Civil Procedure**

"Rule 8. **General Rules of Pleading**

* * *

"(e) **Pleading to be Concise and Direct; Consistency.**

* * *

"(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. * * *"

"Rule 41. **Dismissal of Actions**

"(a) **Voluntary Dismissal: Effect Thereof.**

* * *

"(2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * *"

"Rule 50. **Motion for a Directed Verdict**

"(a) * * * A motion for a directed verdict shall state the specific grounds therefor.

"(b) **Reservation of Decision on Motion.**

* * * Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon

set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *"

"Rule 59. **New Trials; Amendment of Judgments**

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in any action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. * * *

"(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

"(d) **On Initiative of Court.** Not later than 10 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

Code of Laws for South Carolina, 1962, Volume 2, page 224

"Section 10-679. **Pleading when two or more acts of negligence, etc., alleged.**

"When two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which the suit is brought the party plaintiff in such suit shall not be required to state such several acts separately nor shall such party be required to elect upon which he will go to trial but he shall be entitled to submit his whole case to the jury under the instruction of the Court and to

recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint."

DECISION OF COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Argued January 21, 1963. Decided March 13, 1963.)

Before HAYNSWORTH and BRYAN, Circuit Judges, and MICHIE, District Judge.

William A. Horger (Horger & Horger, Charlton B. Horger, and Marshall B. Williams on brief) for Appellant, and Henry Hammer and Henry H. Edens (Edens and Hammer, Julian S. Wolfe, Lofton M. Fanning, and W. T. Klapman on brief) for Appellee.

MICHIE, District Judge:

Appellee's intestate was killed when an automobile in which he was a passenger crashed into a stake-body truck, which had broken down and was being hauled by a pickup truck, and, both vehicles getting out of control, had skidded on the highway and come to a stop blocking the highway to traffic in either direction. The two vehicles belonged to the defendant Morgan F. Livingston and were being driven by the defendants Raymond Barnes and Bradley E. Pou. A truck owned by Reichhold Chemicals, Incorporated and driven by its employee James C. DeLoach, traveling in the opposite direction, had come upon the scene just before the fatal accident occurred but had seen the roadblock in time to stop. Reichhold and DeLoach were also made defendants but the jury found in their favor. It returned a verdict of $15,000.00 against Livingston, Barnes and Pou and judgment was entered thereon.

Only Livingston has appealed and the only issue raised is whether there was sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston acting within the scope of his agency or employment at the time of the accident.

Barnes was a sharecropper on Livingston's rather large farm and also had frequently worked for Livingston over a period of approximately ten years. Livingston owned the stake-body truck as well as the pickup truck involved in the accident and Barnes used the stake-body truck in working on Livingston's farm. He was somewhat lame and was frequently allowed at the end of the day to drive the stake-body truck to his home, about three-quarters of a mile away, and to drive it back to Mr. Livington's house the next morning. He was also occasionally, when he so requested, allowed to drive the truck "to the nearby small town of Livingston, S. C. to get groceries". The pickup truck was used by Mr. Livingston for practically all of his personal driving, leaving an automobile which he also owned for the use of his wife and daughters.

A Mr. Lowther had once employed Mr. Livingston to deliver some poles for him to a fairly distant point and Mr. Livingston had himself carried the poles in the stake-body truck and delivered them. On the morning of the accident Mr. Lowther happened to see Barnes in the stake-body truck and asked him if he would deliver some poles to Ridgeland, South Carolina. Barnes agreed to do so and Lowther paid him $15.00 in advance for doing so. It was understood that Barnes was expected and intended to keep the $15.00.

Barnes picked up the poles and, without advising Livingston of his plans or asking his permission, delivered the poles to Ridgeland and started back toward his home. However the truck broke down on the way back. Barnes then telephoned to Lowther (not Livingston) to report the situation. Lowther drove down to where the truck had broken down and found it parked on a side road. He pulled it further down the side road and off it on the side where he thought it would be safe and left it there, then took Barnes back towards his home telling him that he would bring him back later to get the truck.

Barnes, however, was worried and insisted that he be taken to Mr. Livingston's as he thought the truck should be gotten back that night. So they drove to Mr. Livingston's and arrived there about midnight. Mr. Livingston was in his pajamas about to go to bed, but he came out on his front

porch while Lowther's car was parked at the foot of the steps to the porch.

Barnes told Mr. Livingston what had happened and asked to be allowed to take the pickup truck down to where the stake-body truck had been left and tow the latter back. Mr. Livingston was, of course, angry as he didn't know that Barnes had taken the truck off on such a trip. Mr. Lowther assured him that the truck was in a safe place and Mr. Livingston then very positively refused to let Barnes take the pickup truck and told him several times not to touch the truck that night—all of which, of course, was heard by Mr. Lowther.

Mr. Lowther then drove home leaving Barnes at Mr. Livingston's though he was three-quarters of a mile from his home and somewhat of a cripple. Plaintiff makes much of this incident in an attempt to discredit the unanimous testimony of Lowther, Livingston and Barnes as to what in fact took place in the conversation between them which we have just recounted. So it may be as well here to give, from the record, Mr. Lowther's explanation of why he left Barnes at Mr. Livingston's. It follows:

"Q. Why did you leave him there? He didn't want to go home? Or what was the purpose of—

"Mr. EDENS: We don't need any more leading.

"THE COURT: He is your witness.

"Mr. EDENS: He is doing enough as it is.

"A. Well I offered—I told Raymond I would take him on home. I don't know if it was raining right then much, but it had been raining severely coming home, don't you know. And I told Barnes that I would take him on home, and he said 'No, no. I have put you to enough trouble, that is all right.' So I left him there in Mr. Morgan's yard. Mr. Morgan had gone back in the house and shut the door.

"Q. Do you understand why Barnes stayed there in the front yard instead of letting you drive him home?

"A. Well I didn't think it was very peculiar, because there is another one of his hands that lives in talking distance of Mr. Morgan's house, and I didn't think anything peculiar about it.

"Q. Well you figured that Barnes was going to spend the night in this other house instead of his own home?

"A. I didn't figure that. He just said he wouldn't bother me, and there was a lot of colored houses around there. So I didn't figure anything about it or what he might do. I felt like I had done my job and I didn't feel like—after I had offered to take him home and he refused, why,—

"Q. Well, I say, when you offered,—you say you offered.

"A. I did. I told him I would take him home, which I would have."

After Mr. Lowther left Barnes at Mr. Livingston's Barnes hung around there for about thirty minutes, one may infer to be sure that Mr. Livingston had gone to sleep, and then got in the pickup truck in direct violation of Mr. Livingston's orders and drove to the house of Barnes' son-in-law, Bradley Pou. He told Pou that Mr. Livingston had told him to get Pou, take him down to the location of the stake-body truck and have him steer the stake-body truck while Barnes in the pickup hauled it back to Mr. Livingston's. Barnes testified at the trial, of course, that Livingston had told him no such thing but that he had told Pou that Livingston had in order to induce Pou to go with him. And Pou did.

With Pou steering the stake-body truck and Barnes driving the pickup they hauled the stake-body truck out of the side road and onto the main road and headed towards Livingston. Just prior to reaching the scene of the accident there is a downgrade and on this grade the stake-body truck "ran up" on the pickup and "fastened to" it and pushed it across the road so that, between the two cars, the main part of the roadway was blocked and in order to pass them, a car would have had to go off the hard surface road onto its shoulders. Barnes and Pou tried to unhook the two trucks but could not do so. DeLoach in the Reichhold truck, came up almost immediately, stopped and tried to help them. But in another moment they heard a car coming, apparently very rapidly, from the opposite direction from which De-

Loach had come. So they started in its direction waving flashlights to warn it, DeLoach running and Barnes moving as rapidly as he could. The oncoming car paid no attention to the lights, never checked its speed and crashed into the stake-body truck. Plaintiff's intestate, who was a passenger and asleep, was killed and the other occupants were seriously injured.

The foregoing statement of facts speaks for itself. Obviously, if correct, Barnes was not at the time of the accident engaged in carrying out his employer's business but had engaged in a project of his own in direct violation of his employer's orders. It is true that he may have thought that what he was trying to do would be helpful to his employer's interest. But he was doing it in direct violation of his employer's orders. And it is, of course, well settled that the doctrine of respondeat superior does not apply under such circumstances. *Holder v. Haynes* (1940), 193 S. C. 176, 7 S. E. (2d) 833; 51 A. L. R. (2d) 128.

In an effort to avoid this result counsel for the plaintiff takes the position that we must disregard the positive testimony of Barnes, Livingston and Lowther with respect to the orders given by Livingston to Barnes at the midnight conference at Livingston's house. We are to assume, it is argued, that all three of them committed perjury—Barnes because he was an employee of Livingston, Livingston because he is the principal defendant in the suit—and Lowther why? Why, they say, because he is a friend of Livingston. The record hardly bears this out—at least as to any indication that he is such a close friend of Livingston as to be willing to commit perjury to defend him in a lawsuit. The only evidence on the subject is Lowther's testimony as follows:

> "Q. You and Mr. Livingston are friends?
>
> "A. Well we are not personal friends. I have only been in Mr. Livingston's house once in my life, and that was to buy a cow. I mean, I am not a personal friend of his. I just know him when I see him and speak to him and so forth, but I mean, I am not acquainted personally with him."

Under these circumstances it is unlikely that Lowther would deliberately commit perjury on Livingston's behalf and as all three participants in the conversation are in precise agreement as to what occurred and there is no evidence to indicate anything to the contrary the jury should have accepted that testimony and we do.

The plaintiff makes one more point which deserves brief mention. Some time within the week before the accident a state highway patrolman had stopped Barnes in the stake-body truck in the little town of Neeses—about two miles from Livingston—because the truck did not have any lights on it. And he had told Barnes to tell Mr. Livingston not to let him have the truck any more at night until it was properly equipped with lights. Barnes never reported this to Mr. Livingston and there is nothing in the evidence to suggest that Mr. Livingston ever permitted Barnes to use the truck at night. If Barnes never reported the deficiency to Mr. Livingston he can hardly be charged with negligence in failing to have the lights fixed—especially since he had never authorized Barnes to drive the truck at night, though it may at times have been dusk by the time Barnes left work to drive home, three-quarters of a mile away. It follows that this situation cannot be made a basis for support of the verdict and judgment and that they must be set aside and final judgment entered for the defendant Livingston.

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of March 13, 1963, reversing the judgment of the District Court and remanding the cause, with direction to set aside the verdict and enter final judgment for defendant, Morgan F. Livingston, upon the following grounds:

First

The decision of this Court in setting aside the verdict and directing entry of judgment for defendant Livingston was obviously based upon its conclusion that, "Only Livingston has appealed and the only issue raised is whether there was sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston acting

within the scope of his agency or employment at the time of the accident." In directing entry of judgment for the defendant this Court, therefore, must have overlooked that under the decisions of the United States Supreme Court in *Globe Liquor Co. v. San Roman*, 1948, 332 U. S. 571, 68 S. Ct. 246; *Cone v. W. Va. Pulp & P. Co.*, 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849, and *Weade v. Dichmann, Wright & Pugh*, 337 U. S. 801, 69 S. Ct. 1326, it was without power to direct entry of judgment for the defendant because plaintiff's case also was based upon the alternative independent theory of liability for defendant Livingston's own negligence and as to the issue on this theory of liability the sufficiency of the evidence was not questioned in the District Court by any motions of the defendant for directed verdict, judgment *non obstante veredicto* or for a new trial, nor by any specific ground relating thereto contained in the motions of the defendant as to the other theory of liability based upon agency and imputed negligence, as appears from the record of the case as follows:

EXCERPT FROM PLAINTIFF'S COMPLAINT

"(9) That the joint, several and concurrent negligent, grossly negligent, careless, reckless, heedless, willful and wanton acts of the defendants were proximate and concurring proximate causes of the painful and fatal injuries suffered by the deceased, Joseph Henry Fail, and the damages hereinafter set forth to the parties for whom this action is brought in the following particulars, to wit:

"(a) In the defendant, Morgan F. Livingston, allowing the 1949 Ford stake body truck to be operated upon the highways of this state when he knew or should have known that it was in an unsafe condition."

EXCERPTS FROM TRANSCRIPT OF RECORD

Testimony of Patrolman J. M. Smith

(Pages A-1, 2 and 3 of Appendix for Appellee)

DIRECT EXAMINATION

By Mr. EDENS:

(Tr. 52-54)

"Q. Did you examine that stake-bodied truck?

A. Yes, sir.

Q. Did it have any lights on the rear end of it?

A. No, sir.

Q. Did it have any place for any light?

A. It had the shell for one clearance light on the body, and one reflector shell which the wire was not even running to the one clearance light shell, and the reflector shell—the reflector was broken out of it.

Q. Could you tell whether it was broken out in the wreck or it had been that way for some time?

A. Well I had stopped the vehicle previously and they were not working at that time.

Mr. HORGER: Now, Your Honor, we object to that. It has got to be connected immediately, sir. And we ask that it be stricken.

The COURT: How much prior to the morning of the collision had you seen that same truck?

A. It was within a week.

The COURT: Within a week?

A. Yes, sir.

The COURT: I think it is competent for what it is worth. It is for the jury to say.

Q. And for what did you stop it the week previous?

A. I saw it going down a back street in Neeses, and I had an occasion to stop the truck because it didn't have any lights on it, and I talked with Raymond Barnes, who was driving it at that time. I told him to take the truck back to Mr. Livingston and tell him that if he had let him have it not to let him have it any more at night until it was properly equipped.

Q. And when you observed it on the night of this accident, had there been any changes made so far as the lighting arrangements were concerned insofar as you could detect?

A. Not in my determination.

* * *

Q. Had you ever seen that truck in the custody of anyone but Barnes?

A. To the best of my knowledge, he was the only one that I had seen driving it.

* * *"

Testimony of Raymond Barnes

(Pages A-5, 6 and 7 of Appendix of Appellee)

CROSS EXAMINATION

By Mr. WILLIAMS:

(Tr. 143)

"* * *

Q. Now were you using this truck at night at any time?

A. Was I using it at night?

Q. Yes.

A. Sometimes, yes, sir.

Q. At this particular time when the accident occurred?

A. Yes, sir.

* * *"

By Mr. EDENS:

(Tr. 147-148)

"* * *

Q. Just how are you working for him now?

A. I'm farming a little bit.

* * *

(Tr. 150-152)

Q. After the patrolman stopped you a few days before this wreck, what did you do with that truck after that?

A. Went home.

Q. You went home and kept the truck at your house?

A. Every now and then, yes.

Q. Well when it wasn't at your house, where was it?

A. To Mr. Morgan's house.

* * *

Q. When you didn't have it, he had it. He could look at the truck and see what shape it was in, couldn't he? If he had looked, he could have seen.

A. He could, I reckon.

* * *"

Testimony of Bradley E. Pou

(Page A-11 of Appendix of Appellee)

CROSS EXAMINATION

By Mr. EDENS:

(Tr. 171)

"Q. I am talking about the stake body truck. He (referring to Raymond Barnes) had that in his possession all the time, didn't he? (Parentheses supplied.)

A. Yes, sir.

Q. He and the truck were together all of the time?

A. Yes, sir.

Q. On Mr. Livingston's place. And whatever he had to do or wherever he wanted to go, he used that truck?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. And they wanted to get the truck off the highway that night, that stake body truck. It was Mr. Livingston's truck, wasn't it?

A. Yes, sir, it was his truck.

Q. And they didn't want to leave that stake body truck out on the highway where somebody would run into it, did they? Isn't that right?

A. Yes, sir.

Q. That is the reason they wanted to go get it in the middle of the night, and they got you up in the middle of the night to go get it, didn't they?

A. Yes, sir.

Q. That is all.

* * *"

Testimony of Morgan F. Livingston

(Pages 45 of Appendix of Appellant)

DIRECT EXAMINATION

By Mr. WILLIAMS:

(Tr. 190-191)

"Q. Yes, did you ever let him (Raymond Barnes) drive the stake-body truck? (Parentheses supplied.)

A. Well, sometimes I let him drive it home at night and to come back in it the next morning.

* * *"

(Page A-18 of Appendix of Appellee)

CROSS EXAMINATION

By MR. EBENS:

* * *

"Q. Well he (Raymond Barnes) had authority to drive it to his house and have it and have the key in his pants, didn't he, that night? (Parentheses supplied.)

A. That night, yes, sir.

* * *"

DEFENDANT LIVINGSTON'S MOTION FOR DIRECTED VERDICT

(Reporter's Transcript, page 95)

"Mr. HORGER: Your Honor, my motion is a little different. We move for a directed verdict on behalf of Morgan Livingston, on the ground that there is no connection, that the operation of the vehicle by Raymond Barnes and Pou was within the scope of their authority or that they were acting as agents of Morgan Livingston. Of course, I am not going to argue the issue, but I do want to point out one thing.

* * *

(Reporter's Transcript, pages 256, 257)

Mr. HORGER: Your Honor, of course, we move for a directed verdict, and we first move on the ground that it was due to the sole negligence of the operator of the Oldsmobile automobile, and that was the sole cause of the injuries of which the plaintiff complains of—damages.

We further move for a directed verdict as to the defendant Morgan Livingston on the ground that there is no testimony which will show that Morgan—that Bradley Pou and Raymond Barnes were acting as agents or within the scope and course of their employment.

* * *

DEFENDANT'S WRITTEN NOTICE FOR JUDGMENT NON OBSTANTE VEREDICTO

"NOTICE IS HEREBY GIVEN That the defendant, Morgan F. Livingston, intends to and does hereby move under Rule 50(b) to have judgment entered in accordance with his motion for a directed verdict. The said motion is made upon the grounds urged in his motion for a directed verdict, namely:

"(1) That there is no evidence that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles owned by the defendant, Morgan F. Livingston, at the time of the incident out of which this action arises as the agent or servant of Morgan F. Livingston, or within the scope of their authority, but on the contrary, the only reasonable inference to be drawn from the testimony was that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles involved not as the agent and servant of Morgan F. Livingston and without his authority.

MARSHALL B. WILLIAMS,
CHARLTON B. HORGER,
Attorneys for Defendant,
Morgan F. Livingston."

Orangeburg, S. C.,
April 18, 1962.

Second

This Court, in reversing, notwithstanding the absence of a motion for judgment *non obstante veredicto* as to each alternative independent theory of liability, reached a conclusion that there was not sufficient evidence to warrant the jury in holding that Barnes was an agent or employee of Livingston, acting within the scope of his agency or employment at the time of the collision. Obviously this con-

clusion was based solely upon the testimony of the defendant Livingston, his employee Barnes, and one Lowther, without considering the other evidence and inferences to be drawn therefrom. The Court must have overlooked the *res gestae* statements of Livingston's employee made both at the time he took the truck and at the time of the collision, and that the vehicles owned by the defendant Livingston at the time of the collision were in the possession of Barnes who was using them in the service of defendant Livingston for the purpose of towing Livingston's stake body truck to his farm in Orangeburg County, all of which, thus, raised a jury question under the firmly established principle in South Carolina as enunciated by the Supreme Court in *Chantry v. Pettit Motor Co.*, 156 S. C. 1, 152 S. E. 753, and the cases cited therein, to the effect that, "One who is in possession of property of the owner and uses it in the service of the owner is presumptively a servant of the owner." Additionally, the Court must have overlooked that the testimony of Livingston, Barnes and Lowther was self-contradictory, evasive, equivocal; clouded with uncertainties and generalities, and their demeanor and manner of testifying gave rise to doubts of their sincerity, all of which, under the decisions of the United States Supreme Court in *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, and *Quock Ting v. U. S.*, 140 U. S. 417, raised an issue of credibility which was for the jury to determine, thus making it manifest that the action of this Court in weighing the evidence and judging the credibility of the witnesses constituted an invasion of the province of the jury in violation of the express provisions of the Seventh Amendment to the United States Constitution.

Third

The Court, in reaching its decision directing entry of judgment for defendant, undertook to review the evidence, not only on the issue of agency and imputed negligence under one theory of plaintiff's case, but also undertook to review the issue of defendant Livingston's own negligence on the other alternative independent theory of plaintiff's case. In so doing, this Court must have overlooked that the sufficiency of the evidence on this issue was not questioned

by the defendant Livingston in the District Court by any motions for directed verdict, judgment *non obstante veredicto* or new trial, and that the ground of defendant Livingston's motion for judgment *non obstante veredicto* related solely to the issue of agency and imputed negligence based upon the doctrine of *respondeat superior* as distinguished from the issue of defendant Livingston's own negligence under the other theory of liability. Thus, this Court was without power under the decisions of the United States Supreme Court in *Globe Liquor Co. v. San Roman, supra; Cone v. W. Va. Pulp and P. Co., supra,* and *Weade v. Dichmann, Wright & Pugh, supra,* to review the sufficiency of the evidence for any purpose, particularly for the purpose of directing entry of judgment for defendant Livingston.

Fourth

This Court, in undertaking to review the evidence on the issue of defendant Livingston's own negligence, notwithstanding the absence of any question raised as to the sufficiency of this evidence by defendant Livingston in the District Court, reached the conclusion that the evidence on this issue "cannot be made a basis for support of the verdict." In reaching this conclusion, this Court must have overlooked the testimony which showed (1) that defendant Livingston's stake body truck was without lights and reflectors at the time of the collision resulting in the death of plaintiff's intestate, (2) that the truck had been in such defective condition for at least a week prior to the collision, at which time defendant Livingston's employee was notified of such defective condition by the highway patrolman, (3) that for some time prior to the collision the defendant Livingston saw or could have seen that the truck was defectively equipped with lights and reflectors, and (4) that the defendant Livingston allowed the truck to be operated, by Barnes on the highway in the nighttime, as appears by the evidence heretofore set forth in the First ground of the petition. Thus, this Court, in reaching its conclusion by weighing the evidence and judging the credibility of the witnesses, invaded the province of the jury in vio-

lation of the Seventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons set forth above and in the brief filed by appellee, it is respectfully urged that a rehearing be granted and that upon such rehearing the judgment of the District Court be affirmed as to defendant Livingston, or, at least in the alternative, the cause be remanded with directions to the District Court to grant a new trial as to Defendant Livingston.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
JULIAN S. WOLFE,
LOFTON M. FANNING,
W. T. KLAPMAN,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition For Rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
JULIAN S. WOLFE,
LOFTON M. FANNING,
W. T. KLAPMAN,
Attorneys for Petitioner.

ORDER DENYING PETITION FOR REHEARING

The plaintiff below, Holly Johnson, as administrator of the estate of Joseph Henry Fail, deceased, having filed a petition with this court for a rehearing of its decision of March 13, 1963, reversing the judgment of the District Court and remanding the cause with direction to set aside the verdict and enter final judgment for defendant, Morgan F. Livingston and the court having considered said pe-

tition and being of the opinion that it is without merit the petition is hereby DENIED.

ENTER this order May 2nd, 1963.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

THOMAS J. MICHIE,
United States District Judge.

A true copy,
TESTE:

RICHARD M. F. WILLIAMS, JR.,
Clerk, United States Court of
Appeals for the Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.